FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 18 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

---

# No. 613

---

MAURICE C. SPARLING, SUPERINTENDENT OF BANKS OF THE STATE OF CALIFORNIA, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO, WITH A BRANCH IN LOS ANGELES, IN LIQUIDATION,

*Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), LOEW'S INCORPORATED (A DELAWARE CORPORATION), AND UNIVERSAL PICTURES COMPANY, INC., (A DELAWARE CORPORATION).

*Respondents*

---

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.**

---

S. M. SAROYAN,
DUDLEY T. SHEARER,
SHIRLEY, SAROYAN, SHEARER & SULLIVAN,
*Counsel for petitioner.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Opinions below | 2 |
| Jurisdiction | 2 |
| Statute and subject matter involved | 3 |
| Statement and Question involved | 3 |
| Specification of error | 4 |
| Reasons relied on for the allowance of the writ | 5 |
| Brief in support of petition | 7 |
| Jurisdiction | 7 |
| Statement of facts | 8 |
| Questions presented and specification of errors to be urged | 10 |
| Argument | 12 |
| Conclusion | 19 |


## Table of Cases Cited


| | |
|---|---|
| *Alexewicz* v. *General Aniline & Film Corporation*, 181 Misc. 181 43 N.Y.S. (2d) 713 | 16 |
| *Bliss Petroleum Co. v. McNally*, 254 Mich. 569, 237 N. W. 53 | 13 |
| *Fujikawa* v. *Sunrise Soda Works*, 158 F. (2d) 490 | 19 |
| *Meijer* v. *General Cigar Co.*, 81 NYS (2d) 488 | 12 |
| *Phillips* v. *Whittom*, 192 S. W. (2d) 856 | 15 |
| *Pinkerton Bros.* v. *Bromley*, 77 N. W. 307 | 15 |
| *Siano* v. *Helvering*, 13 Fed. Supp. 776 | 15 |
| *Whitlock* v. *Alexander*, 76 N. E. 538 | 15 |
| *Witters Associates Inc.* v. *Ebsary Gypsum Co.*, 93 Fed. (2d) 746 | 16 |


## Statutes Cited


| | |
|---|---|
| Civil Code of California, Section 3302 | 20 |
| Constitution of California, Article XX, Section 22 | 19 |
| Trading with the Enemy Act, Section 5(b)(2), 50 U.S.C. App. Section 5(b)(2) | 3 |
| United States Code, Title 28, section 1257(3) | 8 |


## Text Cited


| | |
|---|---|
| 35 Corp. Jur. Sec. 488 | 14 |

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

---

# No. 613

---

MAURICE C. SPARLING, SUPERINTENDENT OF BANKS OF THE STATE OF CALIFORNIA, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO, WITH A BRANCH IN LOS ANGELES, IN LIQUIDATION, *Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), LOEW'S INCORPORATED (A DELAWARE CORPORATION), AND UNIVERSAL PICTURES COMPANY, INC., (A DELAWARE CORPORATION), *Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

---

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

The petitioner, Maurice C. Sparling, Superintendent of Banks of the State of California, as Liquidator of the Busi-

ness and Property of The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, in Liquidation, by his counsel, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered in the above cause on November 21, 1949, denying petitioner's application for a hearing in said court from the decision of the District Court of Appeal of the State of California, First Appellate District, Division Two, affirming the judgments of the Superior Court of the State of California in and for the City and County of San Francisco.

## Opinions Below

The order of the Supreme Court of the State of California, (R. 554) reads as follows:

> "Appellants' (Clark and Sparling) petition for hearing denied."

The decision and opinion of the District Court of Appeal of the State of California was rendered and filed on September 29, 1949, and is reported in 93 A. C. A. 917, 209 Pac. (2d) 970.

The Findings of Fact and Conclusions of Law, and Judgments of the Superior Court of the State of California in and for the City and County of San Francisco are set forth in the transcript of record herein (R. 23-33; 59-67; 96-105; 133-143). These judgments were rendered and entered April 19, 1948.

## Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, section 1257 (3). The order of the Supreme Court of the State of California, denying a hearing after the decision of said District Court of Appeal sought to be reviewed, was entered November 21, 1949.

**Statute and Subject Matter Involved**

This case involves the application and interpretation of Section 5(b)(2) of the Trading with the Enemy Act, the so-called exculpatory provisions of said Act, 50 U. S. C. App. Section 5(b)(2), and more particularly, the meaning and application of the words "good faith" in said section, which reads as follows:

> "Any . . . delivery of property or interest . . . to the United States . . . pursuant to . . . any rule issued hereunder shall to the extent thereof be full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this sub-division, or any rule, regulation, instruction, or direction issued hereunder."

The specific dispute in this case relates to the liability of The Yokohama Specie Bank, Ltd., San Francisco Office (now being liquidated by the Superintendent of Banks of the State of California), for damages at the legal rate of 7% per annum, for failure to pay its deposits when due. This failure resulted from the termination, on December 7, 1941, of the bank's license to do business, by an order issued by the President of the United States under Section 5(b) of the Trading with the Enemy Act.

**Statement and Question Involved**

On December 7, 1941, General License No. 69, the federal license under which The Yokohama Specie Bank, Ltd., San Francisco Office, was allowed to do business, was revoked. Treasury Department officials immediately occupied the premises of the bank, making certain that no attempt was made to reopen the bank for business. At the same time deputies from the State Banking Department, representing

the Superintendent of Banks of the State of California, also occupied the premises of the bank, asserting a right of seizure of the business, assets and affairs of the bank pursuant to the Bank Act of the State of California.

On or about December 8, 1941, all four officers of the bank were placed in detention camps as alien enemies, and were at all times detained in the physical custody of the United States government until their repatriation to Japan in June, 1942.

Neither said officers of the bank, nor any depositor, made application to the Treasury Department for authority or a license to reopen the bank or to pay its depositors. On December 18, 1941, the Superintendent of Banks of the State of California applied for a license to conserve and liquidate the bank and received such license on December 27, 1941. The bank is still being liquidated by the Superintendent of Banks. On or about September 2, 1948, an 80% dividend was declared and paid to depositors and creditors.

The question presented is whether the bank can be charged with liability for the failure of the officers of the San Francisco Office of The Yokohama Specie Bank, Ltd., to apply for a Treasury Department license to reopen said San Francisco office of the bank. Do the exculpation provisions of Section 5(b)(2) of the Trading with the Enemy Act render the bank immune from liability?

**Specification of Error**

The trial court, the District Court of Appeal of the State of California in affirming the decision of the trial court, and the Supreme Court of the State of California, in denying an application for hearing in that court, committed error in holding that under the undisputed facts heretofore outlined, the failure of the bank's officers to apply for Treasury Department licenses constituted a lack of good faith, and that the bank therefore could not rely on the exculpatory

provisions of Section 5(b)(2) of the Trading with the Enemy Act.

**Reasons Relied On for the Allowance of the Writ**

The California courts have, in this case, decided a federal question of considerable substance not heretofore determined by this court. The California courts have, in this case, emasculated the protection and immunity from liability afforded by the exculpatory provisions of the Trading with the Enemy Act.

The amount of interest (damages) involved in the present case may amount to approximately one and a half million dollars. The decision herein further will serve as a guide to the Superintendent of Banks of the State of California in the liquidation of other Japanese banks in California. The few decisions specifically considering Section 5(b)(2) of the Act are inconclusive. The proper interpretation of this Act, and particularly the exculpatory provisions thereof, is extremely important. It is a matter that should finally be decided by this court. The facts in the present case are undisputed, the record is complete.

The decision of the California courts in this case on the question of "good faith" is at variance with the universally accepted standard of good faith as applied in other fields of law, both by federal and state courts.

The Superintendent of Banks of the State of California, as Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, respectfully submits that this petition for writ of certiorari should be granted.

Dated, San Francisco, California, February 13, 1950.

S. M. Saroyan,
Dudley T. Shearer &
Shirley, Saroyan, Shearer & Sullivan,
*Counsel for Petitioner.*

**Certificate of Counsel**

The foregoing petition for writ of certiorari, together with the supporting brief herein, is in the opinion of the undersigned well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California, February 13, 1950.

S. M. Saroyan and
Dudley T. Shearer,
*Of Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

---

# No. 613

---

MAURICE C. SPARLING, SUPERINTENDENT OF BANKS OF THE STATE OF CALIFORNIA, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO, WITH A BRANCH IN LOS ANGELES, IN LIQUIDATION, *Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), LOEW'S INCORPORATED (A DELAWARE CORPORATION), AND UNIVERSAL PICTURES COMPANY, INC. (A DELAWARE CORPORATION), *Respondents*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### Jurisdiction

The judgment of the District Court of Appeal, 1st Appellate District, State of California, Division 2 thereof, which is sought to be reviewed herein, was entered September 29, 1949, and affirmed the judgment of the Superior Court

of the State of California, in and for the City and County of San Francisco, which was entered April 19, 1948.

A petition for a hearing in the Supreme Court of the State of California was denied by that court on November 21, 1949.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(3).

The decision and opinion of the District Court of Appeal of the State of California reported in 93 A.C.A. 917, 209 Pac. (2d) 970, is set forth in the Transcript of Record herein, pages 515 to 524.

**Statement of Facts**

The plaintiffs and respondents are depositors in the San Francisco Office of The Yokohama Specie Bank, Ltd. Said bank was a banking corporation, organized under the laws of Japan and doing business in the State of California pursuant to Section 7 of the Bank Act of said state.

On July 26, 1941, by virtue of the extension of Executive Order No. 8389 as amended (Exhibit 35), to Japan, it became necessary for this bank to obtain a license from the United States Government in order to continue to operate. This license was granted by means of General License No. 69 (Exhibit 38), issued by the Treasury Department of the United States. Under this General License the bank continued to operate as any domestic bank, subject to the same licensing requirements in effect with respect to domestic banks insofar as specific transactions involving Japanese nationals were concerned.

On December 7, 1941, as the result of the outbreak of war, General License No. 69 was revoked by the Treasury Department by issuance of Public Circular 8 (Exhibit 40). This Public Circular No. 8 provided as follows:

> "All general licenses, specific licenses, and authorizations of whatsoever character are hereby revoked inso-

far as they authorize, directly or indirectly, any transaction by, on behalf of, or for the benefit of, Japan, or any national thereof."

Before the opening of business on December 8, 1941, the representatives of the Treasury Department of the United States, and also the representatives of the Superintendent of Banks of the State of California were on the premises of the bank, in order to prevent the opening of said bank for business. On said date, the Superintendent of Banks of the State of California took possession of the property and affairs of said bank, by virtue of the Bank Act of the State of California.

Immediately following the outbreak of the war each of the four officers of The Yokohama Specie Bank, Ltd., San Francisco, was placed in a detention camp. Three of said officers (Takase, Daigo, and Uno) were subsequently, on or about December 17, 1941, transferred to a detention camp at Ft. Missoula, Montana, where they remained until March or April, 1942, while the fourth (Motoyoshi) was removed to a detention camp near San Francisco where he remained until June, 1942. (Findings of Fact, No. 12, R. 27). Each of the bank's officers was at all times detained by and in the custody of the United States Government until repatriated to Japan. It is conceded that during the period of their detention in the United States, said officers could have filled out and mailed an application to the Treasury Department, or to the Secretary of the Treasury himself, requesting permission or authorization to reopen the bank and pay the depositors.

On December 18, 1941, the Superintendent of Banks of the State of California made application for a license to conserve and liquidate the business, assets and affairs of The Yokohama Specie Bank, Ltd., San Francisco, in accordance with the Bank Act of the State of California

(Exhibits B and C), and licenses were granted on December 27, 1941 (Exhibits 7, 8 and 9).

Plaintiff depositors filed their respective claims in the liquidation proceedings, not only for the principal amount of their deposits, but for interest on said deposits at the legal rate of 7% from the date of the closing of the bank. The claims were rejected as to that portion pertaining to interest, and the claimants filed these suits for declaratory relief.

None of the bank's four officers ever filed an application for a license or authorization to reopen the bank or pay the depositors, nor did any of the depositors ever apply for a license from the Treasury Department authorizing payment of deposits.

The trial court granted a declaratory judgment declaring the depositors to be entitled to the full 7% interest specified by the Constitution and Statutes of the State of California as damages for the withholding of payment of money when due, said interest to run from the date each deposit fell due. This declaratory judgment has been sustained by the District Court of Appeal of the State of California and a further hearing has been denied by the Supreme Court of said state.

**Question Presented and Specification of Errors to Be Urged**

The trial court herein, in its conclusions of law (R. 31), concluded that as a matter of law each of the four officers of the bank, following the outbreak of war, "had an obligation to plaintiffs to obtain a license authorizing The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, to continue business after December 8, 1941, or a license authorizing payment to plaintiff of its deposits after said date," and that "the failure of said officers, and each of them, to discharge said obliga-

tion showed an absence of 'good faith' of Section 5(b)(2) of the Trading with the Enemy Act, as amended."

Section 5(b)(2) of the Trading with the Enemy Act reads as follows:

> "Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

The question immediately presents itself: Do the undisputed facts support a finding of an absence of good faith on the part of the officers? Did the court commit error in determining, as a matter of law, that the officers had an absolute legal duty to apply for licenses, and failure to do so constituted an absence of good faith?

The Superintendent of Banks of the State of California, both in the trial court and in his briefs before the District Court of Appeal, and also in his petition for a hearing by the Supreme Court of the State of California, has consistently maintained that the officers of the bank, interned as they were as alien enemies, and with the bank's license to do business revoked by the United States Government, and possession of the bank seized by the Superintendent of Banks of the State of California, could not reasonably be expected to take steps to secure a license to reopen the bank and pay depositors. It is submitted that the failure of the bank's officers to apply for such a license cannot be held to constitute bad faith.

## Argument

The principal authority relied upon by the depositors, and regarded by the District Court of Appeal of the State of California as decisive of this case, is *Fujikawa* v. *Sunrise Soda Works,* 158 F. (2d) 490 (C. C. A. 9), cert. den. 331 U. S. 832. That case involved a Japanese bank in Hawaii, whose license to operate was, as here, revoked by the outbreak of war. The depositors sued for interest and were successful. In that case, however, no showing was made that any of the bank's officers was detained or held in physical custody by the government. The court there concluded that the failure of the officers to seek licenses to reopen the bank constituted an absence of good faith. The Alien Property Custodian did not participate in the trial of that action, was not a party at the trial level, and not being satisfied with the record did not join in the petition for certiorari.

The *Fujikawa* case has been interpreted as laying down the rule that in order to show good faith under the exculpatory provisions of Section 5(b)(2) of the Trading with the Enemy Act one must show either (1) that application for a license was made and denied, or (2) circumstances were such as to make the issuance of a license impossible. *Meijer* v. *General Cigar Co.,* 81 NYS (2d) 488 involved a suit by a citizen and resident of Holland against a domestic corporation, alleging breach of an oral contract of employment during the years 1941 to 1947. Citing the *Fujikawa* case the court stated at p. 490:

> "There remains for determination the effect of this change in status upon the contractual relationship existing between the parties. Under Section 3(a) of the statute it was not unlawful for the defendant to continue performance under its contract with the plaintiff provided it did so pursuant to a license

> from the President. Theoretically, therefore, assuming the issuance of the prescribed license, it could have been possible for the parties to have continued to discharge the obligations imposed upon them by the contract. Nothing has been submitted, however, to indicate that application for a presidential license was made and denied, or that governmental action during the period in question was such as to make its issuance impossible. In the absence of such a showing, the Trading with the Enemy Act alone may not be availed of as a defense. *Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.*, 9 Cir., 158 F. 2d 490; *Joring* v. *Harriss*, 2 Cir. 292 F. 974; *Dezsofi* v. *Jacoby*, 178 Misc. 851, 36 N.Y.S. 2d 672; *Brown* v. *J. P. Morgan & Co.*, 177 Misc. 626, 31 N.Y.S. 2d 323."

Such a definition of "good faith" disregards the question of the state of mind of the officers of the bank. It also ignores the question of whether or not the officers acted honestly and in good conscience in omitting to file applications for a license. It would seem, therefore, appropriate to re-examine the question of exactly what is meant by the well known and widely used legal term "good faith".

Respondent depositors rely on certain language in *Bliss Petroleum Co.* v. *McNally*, 254 Mich. 569, 237 N W. 53, at p. 55, wherein the court used the following language:

> "Directors owe the corporation good faith and honest service. Good faith includes not only personal upright mental attitude and clear conscience, but also the intention to observe legal duties."

That case involved the purchase of certain oil leases by the directors, individually, and a subsequent sale of the same by the directors to the corporation, at a profit. The trial court directed a verdict for defendants, but this was reversed on appeal. Immediately following the statement

of the court above quoted the court went on to state (237 N W. 53 at 55):

> "Honest service includes elimination of private gains in corporate transactions conducted by directors and not approved by other authorized disinterested officers, with full knowledge of the facts. If directors undertake to acquire property for the corporation, they act in a trust capacity in acquiring it. Express direction by the corporation to them to purchase is not a requisite of liability in this respect. Nor does the fact that they have a right to deal personally in leases modify their duties as directors when their transactions touch upon the corporation itself. Their obligations and liabilities arise out of their trust duties in dealing fairly with the corporation."

Thus the ultimate test applied in the *Bliss Petroleum* case was that of fair and honest dealing. To state that good faith also includes the intention to observe legal duties, as applied to the present case of the officers of The Yokohama Specie Bank, Ltd., San Francisco, begs the question, involves somewhat of a circuity of reasoning. To determine whether the officers had an absolute legal duty to file applications for a license in order to come within the exculpatory clauses of the Trading with the Enemy Act, the court must first determine whether the omission to file such applications was in good faith in reliance on a governmental order.

Good faith has been variously defined as "the exercise of reasonable care, prudence, and diligence," "that state of mind denoting honesty of purpose," "honest belief," "honesty of intention," "*the exercise of a reasonable discretion in the circumstances.*" 35 Corp. Jr. Sec. 488.

Generally there are two approaches to the problem of good faith, namely, the *subjective* approach—the actual state of mind irrespective of its producing causes;—and the *objective* approach—the exercise of that discretion which a

reasonably prudent person would exercise under the circumstances. These two views are set forth in *Siano* v. *Helvering,* 13 Fed. Supp. 776, where the court adopted the objective view. The plaintiff in that case was a manufacturer of products containing industrial alcohol. His permit to manufacture these products was withdrawn by reason of his failure to pay taxes on certain sales of these products, pursuant to a regulation authorizing withdrawal of a permit unless there existed a good faith compliance with the regulations. Plaintiff stated he had no knowledge of the regulation involved, therefore he was acting in good faith. In rejecting the subjective test, as applied to the facts in that case, the court stated (13 Fed. Supp. at 780, quoting from *Pinkerton Bros.* v. *Bromley,* 77 N. W. 307):

> "To constitute good faith, there must be not only absence, not alone of participation in fraud or collusion with the vendee, but also of knowledge, or even notice of the fraud, or of facts and circumstances calculated to put an ordinary business man on inquiry, so he could ascertain the truth."

An examination of the cases reveals that the particular type of case involved determines which test of good faith, the subjective or the objective, is to be applied. In *Whitlock* v. *Alexander,* 76 N. E. 538, the court stated the test, as applied to corporate officers, to be as follows:

> ". . . good faith requires the exercise by the corporate officers of good sense and reasonable business prudence."

The court, in *Phillips* v. *Whittom,* 192 SW (2d) 856, stated the objective test of good faith in this manner:

> ". . . good faith, however generally imposes a duty on the obligor to use reasonable diligence, the diligence that an honest man of ordinary prudence is accustomed to exercise."

It would seem elementary that, as stated by the court in *Witters Associates Inc.* v. *Ebsary Gypsum Co.*, 93 Fed. (2d) 746, in discussing the meaning of the words "good faith" as used in a federal statute,

> ". . . what is meant by the term must be drawn from the meaning of the words themselves, as interpreted by the context in which they are used, the purpose back of the statute, the mischiefs it was enacted to prevent, the results it was enacted to accomplish."

That case involved the filing of a petition for reorganization under Section 77B(a) of the Bankruptcy Act, the court holding that the filing of a petition "in good faith" meant a filing with a reasonable belief that the debtor is in a position to conform to the requirements of the statute.

The primary purpose of the exculpatory provisions of the Trading with the Enemy Act is to obtain immediate compliance with the Freezing Order and any other orders issued pursuant to Section 5(b) of the Act. To encourage such compliance Section 5(b) (2) creates an immunity from possible liability for any person who complies with such an order, so long as whatever is done or omitted to be done is "done or omitted in good faith" pursuant to and in reliance on such order. This exculpation applies irrespective of the validity or legality of the particular order involved. For example, *Alexewicz* v. *General Aniline & Film Corporation*, 181 Misc. 181, 43 NYS (2d) 713, involved an action by a naturalized citizen of German descent for breach of a written contract of employment. Defendant, a Delaware corporation, had discharged plaintiff upon order of the Treasury Department which asserted that plaintiff might be hostile to the war efforts of United States. The court cited Section 5(b)(2) of the Trading with the Enemy Act, and remarked that the validity of the order was not material, stating, at page 726:

> "Indeed, even if the Secretary of the Treasury lacked the authority to nullify the contract in question, the defendant would still be absolved from liability in the absence of a showing of a lack of good faith."

In the present case the license of The Yokohama Specie Bank, Ltd., San Francisco, to do business was terminated by an order issued pursuant to the Trading with the Enemy Act. The bank's officers, as a result, made no attempt to reopen the bank on December 8, 1941, or thereafter. Within a few days after the outbreak of war, these officers were taken into custody by the United States government, where they remained at all times until their repatriation to Japan. From the subjective point of view there can be no doubt that the officers "honestly" and "in good conscience" relied on the order of the federal government which closed the bank.

The real problem is whether, under the admitted facts of this case, the officers exercised that degree of discretion to be expected of reasonably prudent persons under similar conditions. To lay down an absolute rule that good faith required the filing of applications for licenses is to set a standard of conduct far above that by which these officers should be tested.

Immediately following the outbreak of war we find the officers of the bank faced with the following factual situation:

(1) The bank's license to engage in business had been revoked by the federal government, and Treasury Department representatives were on hand at the premises of the bank to make certain that the bank did not open its doors to transact business.

(2) The Superintendent of Banks of the State of California did on December 8, 1941, take possession of the busi-

ness and affairs of the bank pursuant to sections 135c and 136 of the Bank Act of the State of California. On December 27, 1941, the Superintendent of Banks received a license to conserve and liquidate the affairs of the bank.

(3) Each of the officers was himself in the physical custody of the United States government, and could not have operated the bank, even with a license.

(4) Within a few months all persons of Japanese descent (including the great majority of the depositors) were removed from California and the West Coast.

Under such circumstances how can it be said that the officers' failure to seek licenses constituted bad faith? Confronted with the circumstances outlined above, can it fairly be argued that the officers acted unreasonably in not making applications for a license or that such omission shows a lack of good faith as a matter of law. If it must be shown that the granting of such an application was actually an impossibility, then an impossible burden has been placed on the defendants and intervenor. No matter how positive or fixed might be the Treasury Department's decision not to allow any Japanese bank to reopen, it can always be argued that such a decision might be changed and thus the granting of a license, no matter how unlikely, was not an absolute impossibility.

It is submitted that the real test should be phrased as follows:

Under the circumstances, was the likelihood of the federal government's granting a license to reopen the bank, and the Superintendent of Bank's relinquishing possession, pursuant to the provisions contained in Section 136 of the Bank Act, and the officers being released to go into San Francisco to operate the bank, so infinitesimal that a reason-

ably prudent bank officer could not have been expected to make application for a license to reopen the bank?

In considering the question of whether the officers can be charged with bad faith, it must be remembered that the reopening of the bank by the officers thereof would have necessitated a combination of at least three factors, viz.:

(a) The granting of a license by the Treasury Department,

(b) The approval of the Superintendent of Banks of the State of California, by the relinquishment of possession by him, either voluntarily or by court order, and

(c) The approval of the immigration and military authorities, authorizing the physical release of the officers for the purpose of operating the bank.

It would have been futile to clear any one of the forementioned hurdles unless the other two also were negotiated successfully.

The trial court and the appellate courts of the State of California erroneously have adopted the rule of *Fujikawa* v. *Sunrise Soda Water Works,* (Supra) in the interpretation of Section 5(b)(2) of the Trading with the Enemy Act. A standard of good faith has been imposed which is neither authorized nor intended by Congress in enacting the exculpatory provisions in question. The bank officers certainly cannot be charged with having acted unreasonably or in bad faith in view of the circumstances with which they were confronted.

## Conclusion

Respondents have received judgments declaring that as depositors they are entitled to damages or interest at the legal rate (Article XX, Section 22, of the Constitution of

the State of California; Civil Code of the State of California, Section 3302) of seven per cent (7%) per annum from the date their deposits fell due to the date of payment of principal, to the extent that funds are available for that purpose. These judgments (the various actions by respondents were consolidated for trial) declare that petitioner, as liquidator of The Yokohama Specie Bank, Ltd., is not entitled to the immunity from liability afforded by Section 5(b)(2) of the Trading with the Enemy Act; that the bank's officers were guilty of a lack of good faith in failing to apply for licenses to reopen the bank and pay depositors, following the outbreak of war.

It is submitted that the undisputed facts set forth in the findings of fact of the trial court establish beyond any reasonable doubt that the officers of the bank acted in good faith. It is respectfully submitted that this petition for Writ of Certiorari should be granted and the matter determined by this court.

Dated, San Francisco, California,
February 13, 1950.

S. M. Saroyan, Dudley T. Shearer and
Shirley, Saroyan, Shearer & Sullivan,

*Counsel for Petitioner.*

## SUBJECT INDEX


PAGE

Foreword ..... 1

Statement of the case ..... 2

Summary of the argument ..... 5

Argument ..... 6

I.

This court should not grant certiorari to review the determination of fact made by the trial court that the officers of the Bank showed an absence of "good faith" of Section 5(b)(2) of the Trading With the Enemy Act in failing to attempt to obtain a license authorizing the Bank to continue business after December 8, 1941, or a license authorizing payment of Paramount's deposits after said date, where there is substantial evidence in the record to support such determination ..... 6

II.

The exculpatory clause contained in Section 5(b)(2) of the Trading With the Enemy Act could have no application After December 27, 1941, when the United States Treasury Department licensed the California Superintendent of Banks to liquidate the Bank and pay depositors in accordance with California law ..... 13

III.

The Alien Property Custodian did not vest in himself any excess proceeds available for the payment of interest on respondents' deposits; hence, the Attorney General of the United States, as his successor in interest, has no claim upon the assets involved in this litigation ..... 15

Conclusion ..... 18

## TABLE OF AUTHORITIES CITED


| CASES | PAGE |
|---|---|
| Chrisman v. Miller, 197 U. S. 313 | 10 |
| Dezofi v. Jacoby, 178 Misc. Rep. 851, 36 N. Y. S. 2d 672 | 9 |
| Erie Railroad Co. v. Tompkins, 304 U. S. 64 | 3 |
| Fujikawa v. Sunrise Soda Water Works So., 158 F. 2d 490; cert. den. 331 U. S. 832; rehear. den. 332 U. S. 785 | 9, 10, 11 |
| General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 | 10 |
| Grayson v. Harris, 267 U. S. 352 | 10 |
| Great Northern Ry. Co. v. Donaldson, 246 U. S. 121 | 10 |
| Greva v. Rainey, 2 Cal. 2d 338, 41 P. 2d 328 | 14 |
| Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803 | 9 |
| Merchants Mutual Automobile Liability Ins. Co. v. Smart, 267 U. S. 126 | 10 |
| Metropolitan Life Insurance Co. v. Kane, 117 F. 2d 398 | 3 |
| Murdock v. City of Memphis, 87 U. S. 590 | 3 |
| Sauer v. City of New York, 206 U. S. 536 | 3 |
| Telluride Power Transmission Co. v. Rio Grande Western Ry. Co., 187 U. S. 569 | 10 |
| United States v. Brookridge Farm, 111 F. 2d 461 | 3 |
| United States Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 Pac. 29 | 9 |
| Vesper v. Ashton, 118 S. W. 2d 84 | 9 |
| Yosemite Gold Mining & Milling Co. v. Emerson, 208 U. S. 25 | 10 |

| MISCELLANEOUS | |
|---|---|
| Executive Order No. 8389 | 12, 13 |
| General License No. 69 | 12 |
| Treasury Department Public Circular No. 8 | 12, 13 |

| STATUTES | |
|---|---|
| California Banking Code, Sec. 3122 | 14 |
| First War Powers Act, 55 Stat. 839, 50 U. S. C., App., Sec. 616(2) | 3 |
| Trading With the Enemy Act of October 6, 1917 (50 U. S. C., Sec. 7(e)) | 3 |
| Trading With the Enemy Act, Sec. 5(b)(2) | 2, 3, 5, 8, 9, 11, 12 |

IN THE

# Supreme Court of the United States

October Term, 1949.
Nos. 594 and 613.

J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, and MAURICE C. SPARLING, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO, with a Branch in Los Angeles, in Liquidation,

*Petitioners,*

*vs.*

PARAMOUNT PICTURES INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, LOEW'S INCORPORATED, a Delaware Corporation, and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

*Respondents.*

## BRIEF OF RESPONDENT PARAMOUNT PICTURES INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

### Foreword.

In the interest of brevity, petitioner J. Howard McGrath, Attorney General of the United States, as Successor to the Alien Property Custodian, will be hereinafter referred to as "McGrath"; petitioner Maurice C. Sparling, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of The Yokohama Specie Bank, Ltd., San Francisco, with a Branch in Los Angeles, in Liquidation, will be referred to as "Sparling"; respondent Paramount Pictures Inc. will be some-

times referred to as "Paramount"; the Superintendent of Banks of the State of California will be sometimes referred to as "the Superintendent of Banks"; the Alien Property Custodian sometimes as "the Custodian"; The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, in liquidation, sometimes as "the Bank"; and the District Court of Appeal of the State of California as "the appellate court."

**Statement of the Case.**

The statements of facts (excluding the conclusions interspersed therein) embodied in the petition of McGrath and in the brief filed by Sparling supporting his petition are substantially correct, except that they omit certain material facts which will be supplied in the course of the argument which follows. Moreover, the question presented for review by this Court as set forth in the petition of Sparling at pages 3 and 4 and in his brief at pages 10 and 11 has been fairly expressed.

On the other hand, the discussion and statement of the questions allegedly presented contained in the petition of McGrath (McGrath Petn., pp. 2-4) are misleading and inaccurate. The appellate court did not rest its determination that respondents were entitled to interest on their deposits from the date when each fell due (but not earlier than December 8, 1941) upon the *sole*[1] ground that the Bank's officers had not acted "in good faith" within the meaning of Section 5(b)(2) of the Trading With the Enemy Act, as the McGrath petition declares. (Mc-

[1]Emphasis here, as elsewhere, has been added unless otherwise noted.

Grath Petn., p. 3.) Its determination rested upon two grounds, which it considered separately: (1) That timely payment of respondents' claims by the Bank was not excused under Sections 5(b)(2) and 7(e) of the Act,[2] and (2) that such payment was not prevented by impossibility arising from the operation of law. [R. 516-522.] The first ground is the federal ground of the decision. The second ground, to wit, that performance of the Bank's contracts to pay respondents' deposits when due was not rendered impossible by operation of law, is a non-federal ground of the decision, since it is state law which must be applied to determine the sufficiency of a substantive defense to a contract. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 78; *United States v. Brookridge Farm,* 10 Cir., 111 F. 2d 461, 464; *Metropolitan Life Insurance Co. v. Kane,* 7 Cir., 117 F. 2d 398, 400. Consequently, this Court may examine only the first or federal ground of decision below and may not inquire into the adequacy of the second or non-federal ground. *Murdock v. City of Memphis,* 87 U. S. 590, 626, 631; *Sauer v. City of New York,* 206 U. S. 536, 545-547.

The McGrath petition is further in error when it asserts at page 3 that the appellate court construed "good faith" as requiring a showing by the party claiming exoneration

---

[2]Unlike Section 5(b)(2), the exculpatory clause embraced in Section 7(e) of the original Trading With the Enemy Act of October 6, 1917, 50 U. S. C., Sec. 7(e), does not include an express condition of good faith. However, Section 7(e) was for all practical purposes superseded by Section 5(b)(2), as amended on December 18, 1941, by the First War Powers Act, 55 Stat. 839, 50 U. S. C., App., Sec. 616(2). Hence, Section 5(b)(2) is the controlling section for the entire period during which interest has been awarded to respondents except for the brief ten day interval between December 8, 1941, and December 18, 1941.

that he did everything possible to secure relief from the Government's order by holding that proof that it was established Treasury Department policy after Pearl Harbor to deny all applications for licenses to operate Japanese-owned banks was insufficient, absent a further showing that an application was actually pressed to the personal attention of the Secretary of the Treasury and rejected by him. In so far as the appellate court may be said to have required such a showing, it did so only in upholding its second non-federal ground of decision; namely that, the burden of proving impossibility of performance had not been sustained. [R. 520-522.] Respecting the construction of the phrase "good faith," it relied entirely upon the proposition that because the trial court had found "that there was nothing to prevent these officers from applying for a special license to pay the creditors of the bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of 'good faith' of Section 5(b)(2) of the Trading With the Enemy Act, . . . in view of the evidence produced on cross-examination establishing the power of the officers of the bank after internment to make application for a license we cannot hold that the finding and conclusion of the trial court on this subject are not supported by the evidence." [R. 520.] For these reasons the second question allegedly presented for decision as framed on page 4 of the McGrath petition is a wholly incorrect statement reflecting a confusion of the federal and non-federal grounds of decision below.

## Summary of the Argument.

1. This Court should not grant certiorari to review the determination of fact made by the trial court that the officers of the Bank showed an absence of "good faith" of Section 5(b)(2) of the Trading With the Enemy Act in failing to attempt to obtain a license authorizing the Bank to continue business after December 8, 1941, or a license authorizing payment of Paramount's deposits after said date, where there is substantial evidence in the record to support such determination.

2. The exculpatory clause contained in Section 5(b)(2) of the Trading With the Enemy Act could have no application after December 27, 1941, when the United States Treasury Department licensed the California Superintendent of Banks to liquidate the Bank and pay depositors in accordance with California law.

3. The Alien Property Custodian did not vest in himself any excess proceeds available for the payment of interest on respondents' deposits; hence, the Attorney General of the United States, as his successor in interest, has no claim upon the assets involved in this litigation.

## ARGUMENT.

### I.

### This Court Should Not Grant Certiorari to Review the Determination of Fact Made by the Trial Court That the Officers of the Bank Showed an Absence of "Good Faith" of Section 5(b)(2) of the Trading With the Enemy Act in Failing to Attempt to Obtain a License Authorizing the Bank to Continue Business After December 8, 1941, or a License Authorizing Payment of Paramount's Deposits After Said Date, Where There Is Substantial Evidence in the Record to Support Such Determination.

The issue of good faith was made the subject of specific findings of fact by the trial court. After finding that the Bank's four officers had been interned in various detention camps on or immediately after December 8, 1941, and for a period of some months thereafter, the trial court further found as follows:

> "Under the regulations in force at all of these camps detainees were allowed to confer with members of their families, their attorneys, or other persons having a legitimate reason to visit them; to send and receive communications, subject to censorship for anything harmful to the interests or safety of the United States; to appear in court under guard for good cause shown; and to execute any ordinary legal document. During the above mentioned periods that said officers, and each of them, were in said detention camps, there was nothing to deter or prevent them, or any of them, or their attorneys or agents, from applying to the proper Federal Reserve Bank for a special license to continue the business of the Yokohama Specie Bank, Ltd., San Francisco,

with a branch in Los Angeles, after December 8, 1941, or for a special license to pay plaintiff the amount of its deposits after said date, or, in the event that said application or applications were denied, from appealing from the denial of the same to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; . . . Notwithstanding, neither the Bank nor any officer, director, agent, or person acting on its behalf (excluding the Superintendent of Banks of the State of California) ever made application to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, or to the Treasury Department or its Foreign Funds Control Division, or to any Federal Reserve Bank, for a specific Treasury Department license or licenses to continue the business of The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a specific Treasury Department license or licenses permitting said Bank, after December 8, 1941, to engage in any transaction prohibited by said Executive Order, such, for example, as a license authorizing payment to plaintiff of its deposits." [R. 27-28.]

On the basis of these findings the trial court concluded that:

"The officers of The Yokohama Specie Bank, Ltd., San Francisco Office, as of December 7, 1941, and each of them, had an obligation to plaintiff to attempt to obtain a license authorizing The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, to continue business after December 8, 1941, or a license authorizing payment to plaintiff of its deposits after said date, pursuant to Executive Order No. 8389, as amended, and the regulations

thereunder, and the failure of said officers, and each of them, to discharge said obligation showed an absence of 'good faith' of Section 5(b)(2) of the Trading With the Enemy Act, as amended by the First War Powers Act, December 18, 1941, c. 593, Title III, Sec. 301(2), 50 U. S. C. A., App., Sec. 616(2)."[3] [R. 31.]

There was and is ample evidence in the record to support the trial court's findings and conclusion. The ability of the interned officers, or attorneys acting on their instructions, to have obtained a form of application for a license to continue the Bank's operations or pay a depositor after December 8, 1941, filled it out, and mailed it to the proper person,[4] was undisputed. [R. 334-338.] This would have been the same Form TFE-1 [Ex. 39; R. 239, 364, 378-379] on which three of the officers had made applications for licenses prior to December 8, 1941. [R. 319-320.] The trial judge himself developed the significant testimony that none of the officers knew anything whatever about the Treasury Department's policy not to license the operation of Japanese banks or permit pay-

---

[3]It is important to note that the trial court did not interpret "good faith" as requiring the officers to exhaust every conceivable means of securing relief from the order revoking the Bank's license by conducting a running battle of last-ditch resistance against the federal government's directive, as McGrath repeatedly alleges. (McGrath Petn., pp. 4, 15-16, 20-21, 28.) In order to manifest their good faith the officers need only have attempted to obtain a license *from someone* in authority. They were not obliged to apply first to the appropriate Federal Reserve Bank, and, in the event of denial, from there on all the way up the line to the Secretary of the Treasury himself in order to bring themselves within the protection of Section 5(b)(2).

[4]The proper person to whom the application should have been addressed in the first instance was the Federal Reserve Bank for the district in which the applicant resided or had his principal place of business. [Exs. 39 and 36.]

ment of their depositors outside of a liquidation after December 7, 1941. [R. 366-368.] Yet they made not the *slightest* effort to secure such a license or licenses.[5] [R. 401-402.] On this state of the record the trial judge was fully justified in concluding that the officers had not met the test of "good faith" imposed by Section 5(b)(2).

In his brief Sparling defines "good faith" as the exercise of reasonable prudence and diligence under the circumstances. (Sparling Br., p. 14.) Whether or not the officers of the Bank exercised reasonable prudence and diligence under the particular circumstances of this case in failing to seek a license is purely a question of fact, which was within the exclusive province of the trial judge, sitting without a jury, to determine.[6] The argument of petitioners amounts to no more than that the trial judge should have reached a contrary conclusion on the evidence before him.

It has long been a firmly established rule that the decision of a state court upon a question of fact will not be made the subject of inquiry by this Court where there

---

[5]McGrath makes a minor point of the fact that respondents made no attempt to obtain licenses on their own account. (McGrath Petn., pp. 12-13, 16.) This is immaterial, since the good faith of respondents is not in issue. The question presented is whether the *Bank* "omitted in good faith" to pay its depositors in reliance on a direction issued under the Trading With the Enemy Act. Furthermore, the obligation to obtain a license rested with the Bank, and not with the depositors. *Fujikawa v. Sunrise Soda Water Works Co.*, 9 Cir., 158 F. 2d 490, 492, cert. denied 331 U. S. 832, rehearings denied 332 U. S. 785, 853; *Dezsofi v. Jacoby*, 178 Misc. Rep. 851, 36 N. Y. S. 2d 672, 674; *cf. United States Trading Corp. v. Newmark Grain Co.*, 56 Cal. App. 176, 205 Pac. 29, 32.

[6]The presence or absence of "good faith" has always been recognized as a question of fact for the trial court. See, for example, *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803, 805; *Bumgarner v. Orton*, 63 Cal. App. 2d 841, 146 P. 2d 67, 69; *Vesper v. Ashton*, 118 S. W. 2d 84, 89.

is substantial evidence in the record to support the state court's decision.

Thus, in *Great Northern Ry. Co. v. Donaldson,* 246 U. S. 121, 123-124, this Court held that it was not its province to weigh conflicting testimony, and where the record showed testimony supporting the decision, that was as far as the Court entered upon a consideration of the question.

In *Yosemite Gold Mining & Milling Co. v. Emerson,* 208 U. S. 25, it further held that a decision of a state court holding that the decision of the trial court on a question of fact on conflicting evidence was conclusive on appeal, did not amount to a denial of a federal right so as to give the United States Supreme Court a right to review the decision of the state supreme court.

To the same effect are *Chrisman v. Miller,* 197 U. S. 313, 319 ("In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunal as final"); *Grayson v. Harris,* 267 U. S. 352, 357-358; *Merchants Mutual Automobile Liability Ins. Co. v. Smart,* 267 U. S. 126, 131-132; *Telluride Power Transmission Co. v. Rio Grande Western Ry. Co.,* 187 U. S. 569, 584; *cf. General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178.

Two additional considerations bearing upon the issue of good faith should be called to the Court's attention. In *Fujikawa v. Sunrise Soda Water Works Co.,* 9 Cir., 158 F. 2d 490, interest at the legal rate was awarded to depositors of a Japanese owned bank under circum-

stances almost identical with those of the instant case. Among other things the Ninth Circuit Court of Appeals held at page 494 of its opinion that the failure of the bank's officers to endeavor to obtain a license permitting a limited operation of the bank after Pearl Harbor Day showed an absence of "good faith" of Section 5(b)(2) of the Trading With the Enemy Act. A writ of certiorari to review this decision was denied in 331 U. S. 832, and two applications for a rehearing were likewise denied in 332 U. S. 785, 853.[7]

Secondly, quite apart from the presence or absence of good faith on the part of its officers, the *Bank* was guilty of bad faith in failing to make timely payment of respondents' deposits. In this connection the trial court made the following findings of fact [R. 24-26], which are supported by the evidence:

In mid 1940 the Imperial Japanese Household owned between one-fourth and one-half of the Bank's capital stock; the election of its directors was subject to approval by the Japanese Minister of Finance; and at all times material to this controversy prior to December 8, 1941, it was an official fiscal agent and under the general control of the Japanese Government. [R. 409-411.] On December 7, 1941, immediately after the Japanese attack on Pearl Harbor and as a direct and proximate consequence thereof, the Treasury Department issued Public Circular

---

[7]The only possible ground for distinguishing the *Fujikawa* case is that it cannot be ascertained from the opinion whether or not the Japanese bank officials there involved were placed under restraint.

No. 8, which revoked General License No. 69, thereby reimposing all the prohibitions of Executive Order No. 8389 upon the Bank [Ex. 40; R. 215-216], said attack also being directly responsible for the action of the Superintendent of Banks in taking possession of the Bank's property and business. [R. 225.]

In short, the Bank was an agent of the Japanese government, which ordered the sneak attack on Pearl Harbor, which in turn precipitated the revocation of the Bank's license by the Treasury Department and the seizure of its property and business by the Superintendent of Banks.

In view of the foregoing dissertation it becomes apparent that neither the trial court nor the appellate court has emasculated the protection from liability afforded by the exculpatory clauses of the Trading With the Enemy Act or reversed the salutary rule of the cases which have applied them under proper conditions, as petitioners charge. (McGrath Petn., p. 20; Sparling Petn., p. 5.) The trial court has simply decided that under the special facts of this case the Bank did not "omit" to pay its depositors "in good faith," wherefore Section 5(b)(2) does not provide exoneration. The appellate court has held this decision to be supported by the evidence. As hereinabove shown this is a factual matter which should not be reviewed by this Court.

## II.

**The Exculpatory Clause Contained in Section 5(b)(2) of the Trading With the Enemy Act Could Have No Application After December 27, 1941, When the United States Treasury Department Licensed the California Superintendent of Banks to Liquidate the Bank and Pay Depositors in Accordance With California Law.**

Petitioners argue substantially that the Bank cannot be held liable for damages in the form of interest for failure to pay respondents' deposits when due because it "omitted in good faith" to make such payments "in reliance on" a "regulation" or "direction" issued under the Trading With the Enemy Act, namely Public Circular No. 8, which revoked the Bank's general license to operate on December 7, 1941, thereby reimposing all the prohibitions of Executive Order No. 8389, as amended. (McGrath Petn., pp. 3-7; Sparling Petn., p. 3.) Paramount, on the other hand, contends that after December 27, 1941, the Bank was no longer omitting to pay respondents in reliance on a regulation issued under the Act, since on that date United States Treasury Department licenses were issued by the Federal Reserve Bank of San Francisco, acting under the direction of the Treasury Department, to the California Superintendent of Banks, authorizing him to effect all transactions ordinarily incidental to the liquidation of the property and business of the San Francisco and Los Angeles Branches of the Bank, *including payments to depositors,* in accordance with the

laws of California. [Exs. 7 and 8; R. 28.] After receiving these licenses the Superintendent of Banks, who had succeeded to the position of the Japanese management of the Bank, was no longer prohibited by a federal regulation from paying its depositors. *On the contrary, he was now expressly authorized by the federal authorities to pay the depositors.* And, as McGrath and Sparling concede, conduct of the liquidation proceedings by state officers pursuant to federal authorization has continued from December 27, 1941, down to the present time. (McGrath Petn., p. 11; Sparling Petn., p. 4.)

It follows that at least from December 27, 1941, on, the liability of the Bank for interest was dependent, not upon any theory of action or non-action by the Bank or its officers, but upon California law as to the rights of depositors and creditors of a bank in liquidation. Under settled California law, if any assets remain after the claims of all depositors and creditors of the bank have been paid, such assets are to be applied to the payment of interest on the claims at the legal rate of 7% per annum from the date of suspension of business to the date of payment before any distribution is made to the stockholders. California Banking Code, Section 3122; *Greva v. Rainey,* 2 Cal. 2d 338, 41 P. 2d 328, 333-334.

## III.

**The Alien Property Custodian Did Not Vest in Himself Any Excess Proceeds Available for the Payment of Interest on Respondents' Deposits; Hence, the Attorney General of the United States, as His Successor in Interest, Has No Claim Upon the Assets Involved in This Litigation.**

McGrath's claim to the Bank's funds which are available for the payment of interest on respondents' deposits is founded solely upon Vesting Order No. 1324, executed April 22, 1943 [Ex. 12; R. 9-10, 211, 229], whereby the Custodian vested in himself the *excess* proceeds of the business and property of the California Branch of the Yokohama Specie Bank *after payment of the claims of creditors accepted, allowed or established in accordance with the banking law of the State of California, together with interest on such claims,* and expenses of liquidation.[8 9] [R. 13-15.]

---

[8]The property vested in the Custodian was described in the Order as follows:

> "The *excess* proceeds, if any, of the business and property of the California Branch in the possession of the Superintendent of Banks of the State of California, acting in his capacity as Superintendent of Banks, Liquidator and/or Conservator, or which may hereafter come into his possession in any such capacity under and by virtue of the banking law of the State of California, owned or controlled by or payable or deliverable to or held on behalf of or on account of or owing to the California Branch remaining after payment of the claims of the creditors of the California Branch accepted, allowed or established in accordance with the banking law of the State of California, arising out of the business of the California Branch transacted in the State of California, *together with interest on such claims* and the expenses of liquidation." [R. 13.]

Said Order also provided:

> "Nothing in this order is intended to affect the right and power of the Superintendent of Banks of the State of Cali-

The trial court made the following findings of fact with respect to said Order:

". . . In and by said Vesting Order No. 1324 said Alien Property Custodian did not vest in himself the excess proceeds, if any, of the business and property of the said California Branch of The Yokohama Specie Bank, Ltd., in the possession of the Superintendent of Banks of the State of California remaining after payment of the principal of the

---

fornia, acting in his capacity as Superintendent, Liquidator and/or Conservator, to continue to retain possession of, collect and liquidate such business, property and assets and, in the course of said liquidation or conservatorship, to do such acts and perform such duties (not inconsistent herewith) as may be required of or permitted to said Superintendent of Banks in his capacity as Superintendent, Liquidator and/or Conservator, as aforesaid, by and in accordance with and subject to the provisions of the Bank Act of the State of California; provided, however, that *after the claims of the creditors* of the California Branch described in subparagraph 4 hereof, *together with interest thereon* and the expenses of liquidation, *have been paid in full, the remaining assets* of the California Branch, or the proceeds thereof, in the possession of said Superintendent of Banks or to which he may be or become entitled acting in his capacity as Superintendent, Liquidator and/or Conservator, *shall be held for the account of and subject to the further order of the Alien Property Custodian.*" [R. 14.]

---

[9]The wording of the Order effectively rebuts McGrath's contention that upon its issuance the Custodian became the real owner of the Bank. (McGrath Petn., pp. 23-24.)

In the same connection McGrath argues that having become the real owner of the Bank on April 22, 1943, the Custodian was under no duty to apply to himself for a license to pay respondents' deposits, and therefore there is no possible justification for paying interest after the date of vesting. (McGrath Petn., p. 25.) The simple answer to this argument is that there was no necessity for the Custodian to apply to himself for a license to pay respondents' deposits after April 22, 1943, because, as hereinbefore noted, federal permission had already been granted the Superintendent of Banks on December 27, 1941, to pay these deposits in the course of liquidation.

claims of the creditors of said California Branch accepted, allowed or established in so far as the same might be available for the payment of interest at the rate of seven per cent (7%) per anum upon the principal of said claims from the date of suspension of business, (namely, December 8, 1941) except where under the terms of the contract out of which the claim arose the due date was subsequent to the date of suspension of business in which event interest would commence to run from the due date until the date of payment of principal." [R. 29-30.]

Wherefore, it concluded that:

"Plaintiff in intervention as successor to the Alien Property Custodian, has no claim in or to any funds remaining in the hands of the Superintendent of Banks which may be available for the payment of interest as prayed in plaintiff's complaint herein, and his claims are not adverse to the claims of plaintiff herein; and plaintiff in intervention is not a proper plaintiff in intervention in this action, and he has no interest in this controversy whatever, either sufficient to enable him to assert any defenses to plaintiff's claim for interest herein, or otherwise, or at all." [R. 31-32.]

It is submitted that the trial court correctly construed the vesting order in accordance with the plain meaning of its language. It follows that since the Custodian has vested in himself only the excess proceeds *after* payment of interest on creditors' claims, McGrath, as his successor in interest, has no litigable interest in this controversy.

## Conclusion.

It should not be lost sight of that the decision in this case actually turns upon the relative rights of the depositors and creditors upon the one hand and the Japanese stockholders of the Bank upon the other. This is inevitable because McGrath stands in the shoes of the stockholders. The only rights which he acquired under the Custodian's vesting order [Ex. 12] were such rights as those stockholders then possessed. Those were the only rights which he could acquire thereby.

As between the depositors and the Japanese stockholders surely the latter and not the former should bear the loss incident to the deprivation of use of the depositors' monies. Paramount and the other depositors were in no way responsible for the closing of the Bank and the long delay attendant upon its liquidation.[10] The Bank was not equally blameless, however. As previously observed it was an official fiscal agent and under the general control of the Japanese government, which started the war between the United States and Japan, which in turn brought about the revocation of the Bank's license and the seizure of its property and business.

Even if the Bank had been entirely free from fault in connection with its closing, it would seem that the risk

---

[10]A first 80% dividend on the principal of their claims was not paid to depositors and creditors until on or about September 2, 1948, nearly seven years after the Bank suspended business. (Sparling Petn., p. 4.)

of unanticipated circumstances should be thrown upon it and not upon the depositors. Any bank assumes many risks when it opens its doors for business and accepts deposits. In effect it promises to repay those deposits in all events—whether times are good or bad, whether world conditions are orderly or chaotic.

For these equitable reasons and for the legal reasons hereinbefore stated, it is respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

HOMER I. MITCHELL,

JOHN WHYTE,

*Attorneys for Respondent Paramount Pictures Inc.*

O'MELVENY & MYERS,

*Of Counsel.*

## SUBJECT INDEX.

PAGE

Preface ..... 1

Summary of argument ..... 2

Argument ..... 3

Point I. The trial court decided that custodian had no interest in this controversy sufficient to enable him to assert any defense to respondents' claims to interest. Petitioner McGrath in his petition for certiorari did not seek a review of its decision upon that point and, accordingly, the petition of McGrath should be denied ..... 3

Point II. The petitioner Superintendent of Banks argued in the trial court that Section 5(b) (2) of the Trading with the Enemy Act was inapplicable to the questions at issue in this case. He cannot now be heard to urge its applicability as a ground for reversal of the decision below ..... 7

Point III. After December 27, 1941, there was no Federal impediment to payment of respondents' claims in the liquidation proceedings and the exculpatory clauses of the Trading With the Enemy Act are therefore inapplicable ..... 9

Point IV. This court should not grant a petition of certiorari to review the findings of fact of the court below to the effect that the Bank and its officers lacked the "good faith" required by Section 5(b) (2) of the Trading With the Enemy Act ..... 12

## TABLE OF AUTHORITIES CITED.


**CASES** PAGE

Carpet, Linoleum and Resilient Floor Decorators Union v. Dayton Company, 94 L. Ed. Adv. Sheets (No. 10) 454..... 11

Connecticut Railway & Lighting Co. v. Western Electric Co., 305 U. S. 493..... 4

Fujikawa v. Sunrise Soda Water Works, 158 F. 2d 490; cert. den., 331 U. S. 832; reh. den., 332 U. S. 785; app. to file second petition den., 332 U. S. 853.....14, 16

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175.....4, 17

Great Northern Railway v. Sutherland, 273 U. S. 182..... 6

Greva v. Rainey, 2 Cal. 2d 338..... 11

Matheson v. Hicks, 10 F. 2d 872..... 6

McGowan v. McDonald, 111 Cal. 57..... 11

Miller v. Rouse, 276 Fed. 715..... 6

Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146..... 8

Paramount Pictures, Inc. v. Clark, 93 A. C. A. 917..... 15

People v. California Safe Deposit & Trust Co., 34 Cal. App. 269 ..... 11

Rorick v. Devon Syndicate Ltd., 307 U. S. 299..... 4

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508..... 16

State of Maryland v. Baltimore Radio Show, 94 L. Ed. Adv. Sheets (No. 5) 240..... 11

Sutherland v. Guaranty Trust Co., 11 F. 2d 696..... 6

United States v. Johnson, 268 U. S. 220..... 16

**STATUTES**

Alien Property Custodian Vesting Order 1324.....4, 5, 6

Trading With the Enemy Act, Sec. 5(b)..... 7

Trading With the Enemy Act, Sec. 5(b) (2).....2, 12, 16

IN THE

# Supreme Court of the United States

October Term, 1949
Nos. 594 and 613.

No. 594

J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian,

*Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, LOEW'S INCORPORATED, a Delaware Corporation, and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

*Respondents.*

No. 613

MAURICE C. SPARLING, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of THE YOKOHAMA SPECIE BANK, LTD., San Francisco, with a Branch in Los Angeles, in Liquidation,

*Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association), LOEW'S INCORPORATED (a Delaware Corporation), and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

*Respondents.*

## Answer of Respondents, Bank of America National Trust and Savings Association, Loew's Incorporated and Universal Pictures Company, Inc., to Petitions for Certiorari.

### Preface.

Respondents, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, LOEW'S INCORPORATED and UNIVERSAL PICTURES COMPANY, INC., will be sometimes referred to as "respondents"; petitioner, J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, will be some-

times referred to as "McGRATH"; the Superintendent of Banks of the State of California will be sometimes referred to as the "Superintendent of Banks"; the Alien Property Custodian will sometimes be referred to as the "Custodian"; the Yokohama Specie Bank, Ltd., with a Branch in Los Angeles, in liquidation, will sometimes be referred to as the "Bank" and the District Court of Appeal of the State of California as the "Appellate Court."

## Summary of Argument.

The petitions for certiorari of McGRATH and of the Superintendent of Banks should be denied because:

1. The trial court decided that the Custodian had no interest in this controversy sufficient to enable him to assert any defense to respondents' claims to interest. Petitioner McGRATH in his petition for certiorari did not seek a review of its decision upon that point, and accordingly, the petition of McGRATH should be denied.

2. Petitioner Superintendent of Banks argued in the trial court that Section 5(b) (2) of the Trading With the Enemy Act was inapplicable to the questions at issue in this case. He cannot now be heard to urge its applicability as a ground for reversal of the decision below.

3. After December 27, 1941 there was no Federal impediment to payment of respondents' claims in the liquidation proceedings and the exculpatory clauses of the Trading With the Enemy Act are therefore inapplicable.

4. This court should not grant a petition of certiorari to review the findings of fact of the court below to the effect that the bank and its officers lacked the "good faith" required by Section 5(b) (2) of the Trading With the Enemy Act.

## ARGUMENT.

### POINT I.

**The Trial Court Decided That Custodian Had No Interest in This Controversy Sufficient to Enable Him to Assert Any Defense to Respondents' Claims to Interest. Petitioner McGrath in His Petition for Certiorari Did Not Seek a Review of Its Decision Upon That Point and, Accordingly, the Petition of McGrath Should Be Denied.**

The trial court ruled that the Alien Property Custodian had no interest in the controversy and was not a proper plaintiff. In its Conclusion of Law No. 4, in each case the court declared:

> "Plaintiff in intervention, as successor to the Alien Property Custodian, has no claim in or to any funds remaining in the hands of said Superintendent of Banks which may be available for the payment of interest as prayed in Plaintiff's complaint herein, and his claims are not adverse to the claims of plaintiff herein; and plaintiff in intervention is not a proper plaintiff in intervention in this action, and he has no interest in this controversy whatever, either sufficient to enable him to assert any defense to plaintiff's claim for interest herein, or otherwise, or at all." [Rec. pp. 66, 104, 141.]

This Conclusion of Law was based on the finding of fact that:

> "15. * * * In and by said Vesting Order No. 1324 said Alien Property Custodian did not vest in himself the excess proceeds, if any, of the business and property of the California Branches of The

Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of California remaining after payment of the principal of the claims of the creditors of said California Branches accepted, allowed or established in accordance with the banking law of the State of California in so far as the same might be available for the payment of interest at the rate of seven per cent (7%) per annum upon the principal of said claims from the date of suspension of business, namely, December 8, 1941 (except where under the terms of the contract out of which the claim arose the due date was subsequent to the date of suspension of business in which event interest would commence to run from the due date) until the date of payment of principal." [Rec. pp. 64, 102, 139.]

Petitioner McGrath in his petition for certiorari having failed to ask this court to review the foregoing finding and conclusion of the trial court this court will not under its long established practice review that determination and McGrath's petition for certiorari should be denied.

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177;

*Connecticut Railway & Lighting Co. v. Western Electric Co.*, 305 U. S. 493;

*Rorick v. Devon Syndicate Ltd.*, 307 U. S. 299, 303.

The determination of the trial court that the Alien Property Custodian by his vesting order No. 1324 had not vested in himself the amounts necessary to pay interest

upon the claims of depositors, was correct. The vesting language of the order was:

"4. Finding, therefore, that the property described as follows:

The excess proceeds * * * owned or controlled by or payable to deliverable to or held on behalf of or on account of or owing to the California Branch *remaining after payment of the claims of the creditors of the California Branch accepted, allowed or established in accordance with the banking law of the State of California, arising out of the business of the California Branch transacted in the State of California,* TOGETHER WITH INTEREST* on such claims and the expenses of liquidation, is property within the United States owned or controlled by a national of a designated enemy country (Japan), and also is property which is payable or deliverable to, or claimed by, a national of a designated enemy country (Japan) * * *.

7. Deeming it necessary in the national interest: hereby vests in the Alien Property Custodian the property hereinbefore described in subparagraph 4, * * *." [Rec. pp. 13-14, 178.]

Vesting Order 1324 continued:

"* * * provided, however that after the claims of the creditors of the California Branch described in subparagraph 4 hereof, *together with interest thereon*

---

*Emphasis here, as elsewhere, has been added unless otherwise noted.

> and the expenses of liquidation, have been paid in full, the remaining assets of the California Branch, or the proceeds thereof, in the possession of said Superintendent of Banks * * * shall be held for the account of and subject to the further order of the Alien Property Custodian." [Rec. pp. 14, 178.]

Vesting Order 1324 clearly limited the property thereby vested in the Alien Property Custodian to the excess proceeds in the possession of the Superintendent of Banks remaining after the payment of claims of depositors and interest on such claims.

It is too well settled to be the subject of controversy that the interest of the Alien Property Custodian is defined and limited by his vesting order.

> *Great Northern Railway v. Sutherland,* 273 U. S. 182;
>
> *Miller v. Rouse,* 276 Fed. 715;
>
> *Matheson v. Hicks,* 10 F. 2d 872;
>
> *Sutherland v. Guaranty Trust Co.,* 11 F. 2d 696.

For both of the foregoing reasons McGRATH is not entitled to a review by this court.

## POINT II.

**The Petitioner Superintendent of Banks Argued in the Trial Court That Section 5(b) (2) of the Trading With the Enemy Act Was Inapplicable to the Questions at Issue in This Case. He Cannot Now Be Heard to Urge Its Applicability as a Ground for Reversal of the Decision Below.**

The Superintendent of Banks at the trial took the position that Section 5(b) of the Trading With the Enemy Act as amended was inapplicable.

At page 492 of the record the Superintendent of Banks, through his counsel, stated to the court:

> "Fourthly, the Superintendent does not believe that the exculpatory clause in Section 5 B of the Trading with the Enemy Act as amended in 1941 is applicable. We do not see in that section any language that can be said to have any bearing on this case."

And at page 493 of the record he continued:

> "Now, the only portion of this exculpatory clause that could be applicable is the second portion, which provides that no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of or in pursuance of or in reliance on Section 5 B or any regulation, instruction, or direction issued thereunder.
>
> Now, for just a moment let us query; did the bank or its management omit to do business or to pay depositors in pursuance of or in reliance in good faith on some Federal order in public circular issued under

Section 5 B or some executive order issued thereunder? The answer to that question is that the omission of the bank and its officers was not pursuant to Section 5 B, in the first instance, and since the Superintendent of Banks had already closed the banks and prevented any officer from reopening ten days before Section 5 B 2 became law, also the bank's officers omitted to open the bank because they were incarcerated under some other Federal authority and it was physically impossible for them to open the bank, and *I don't think this section is applicable.*"

The Superintendent of Banks, having taken the position in the trial court that Section 5(b) of the Trading With the Enemy Act was inapplicable, cannot now seek to review the judgment upon the sole ground that Section 5(b) is applicable.

*Ohio ex rel. Seney v. Swift & Co.*, 260 U. S. 146, 149.

The petition for certiorari of the Superintendent of Banks should be denied.

## POINT III.

**After December 27, 1941 There Was No Federal Impediment to Payment of Respondents' Claims in the Liquidation Proceedings and the Exculpatory Clauses of the Trading With the Enemy Act Are Therefore Inapplicable.**

The bank was closed on December 7, 1941 as the result of two independent causes. The Superintendent of Banks took physical possession of the Bank [Finding of Fact No. 10, Rec. pp. 61, 99; Finding of Fact No. 11, Rec. p. 136], the Secretary of the Treasury revoked its license to do business [Finding of Fact No. 9, Rec. pp. 61, 99; Finding of Fact No. 10, Rec. p. 136].

Immediately thereafter and on December 18, 1941 petitioner Superintendent of Banks applied for a Federal license to authorize, among other things, payments to the depositors of the Bank [Rec. p. 260]. Upon this application and on December 27, 1941 licenses were duly issued to the Superintendent of Banks [Exhibits 7 and 8, Rec. p. 199] which provided as follows:

> "As Superintendent of the Banks of the State of California, and in accordance with the laws of said state, you are hereby authorized to effect all transactions ordinarily incidental to the liquidation of the property and business of the Los Angeles Branch of The Yokohama Specie Bank, Ltd. (The Yokohama Shokin Ginko) *including payments to depositors,* sales of securities, delivery of collateral, salaries and all other transactions appropriate to the orderly liquidation." [Exhibits 7 and 8, Rec. p. 199.]

The effect of these licenses was summarized at the trial by the attorney for the Superintendent of Banks at page 491 of the record as follows:

> "Now, on December 27, 1941, the Secretary of the Treasury granted to the California conservator a license to liquidate the business and property of the bank. Irrespective of what the actual situation was for a period of nineteen days from the 8th day of December, 1941 to the 27th day of December, 1941, on the latter date and thereafter the conservatorship and liquidation of the affairs of this bank was in no different condition or status than any ordinary domestic bank in liquidation.
>
> At least on that date it became a pure and simple bank liquidation, with the conservator and/or liquidator obliged by law to marshall all the funds, moneys, and assets due and owing to the bank, in order to pay a dividend to depositors and other creditors.
>
> I wish also to point out at this time to your Honor's attention that the Superintendent of Banks could have, under Section 135 C of the Bank Act, that is, the conservatorship, forthwith ordered a partial distribution to creditors or made available funds for withdrawal, but such distribution must be on a ratable basis to all creditors, and even if Paramount Pictures, one of the plaintiffs in these proceedings, had obtained a license to receive payment of its deposit during conservatorship proceedings, no such payment would have been made to any single depositor by the conservator, unless he had sufficient funds to make ratable distribution to all." [Rec. pp. 491-492.]

From December 27, 1941, the date of these licenses, no Federal order prevented payment to the respondents by the Superintendent of Banks [Rec. p. 488]. Payment was delayed only by the ordinary processes of liquidation, not by any order of the Secretary of the Treasury or of any other Federal authority. Under well established decisions by California courts interest is payable to depositors in liquidation if a surplus is available for that purpose.

*Greva v. Rainey,* 2 Cal. 2d 338;

*McGowan v. McDonald,* 111 Cal. 57;

*People v. California Safe Deposit & Trust Co.,* 34 Cal. App. 269.

The decision which is sought to be reviewed is thus supportable on a non-Federal ground and the petitions for certiorari should, therefore, be denied.

*State of Maryland v. Baltimore Radio Show,* 94 L. Ed. Adv. Sheets (No. 5) 240, 243.

*Carpet, Linoleum and Resilient Floor Decorators Union v. Dayton Company,* 94 L. Ed. Adv. Sheets (No. 10), page 454.

## POINT IV.

**This Court Should Not Grant a Petition of Certiorari to Review the Findings of Fact of the Court Below to the Effect That the Bank and Its Officers Lacked the "Good Faith" Required by Section 5(b) (2) of the Trading With the Enemy Act.**

The trial court concluded that the officers of the Bank had an obligation to attempt to obtain a license authorizing it to continue business or to pay its depositors and that the failure to take either step evidenced an absence of the "good faith" required to make Section 5(b) (2) of the Trading With the Enemy Act applicable.

Despite the internment of the officers of the Bank, the trial court found:

> "11. * * * there was nothing to deter or prevent them, or any of them, or their attorneys or agents, from applying to the proper Federal Reserve Bank for a special license to continue the business of The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a special license to pay plaintiff the amount of its deposits after said date, or, in the event that said application or applications were denied, from appealing from the denial of the same to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; or from applying to the above entitled court (the Superior Court) on or after December 8, 1941, to enjoin further proceedings against the Bank by the Superintendent of Banks of the State of California pursuant to Section 136 of the California Bank Act; or from attempting to obtain the consent of said Super-

intendent of Banks pursuant to Section 136 of said Bank Act that the Bank might resume business upon such conditions as he might approve. Notwithstanding, neither the bank nor any officer, director, agent or person acting on its behalf (excluding the Superintendent of Banks of the State of California) ever made application to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, or to the Treasury Department or its Foreign Funds Control Division, or to any Federal Reserve Bank, for a specific Treasury Department license or licenses to continue the business of the Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a specific Treasury Department license or licenses permitting said Bank, after December 8, 1941, to engage in any transaction prohibited by said Executive Order, such, for example, as a license authorizing payment to plaintiff of its deposits. Moreover, none of the above mentioned persons ever applied to the above entitled Court on or after December 8, 1941, to enjoin further proceedings against said Bank by the Superintendent of Banks of the State of California pursuant to Section 136, or any other provision of said Bank Act; nor did any of said persons ever seek to obtain the consent of said Superintendent of Banks pursuant to Section 136, or any other provision of said Bank Act that said Bank might resume business upon such conditions as might be approved by said Superintendent of Banks." [Finding of Fact No. 11, Rec. pp. 62-63, 100; Finding of Fact No. 12, Rec. p. 137.]

Based upon this finding of fact the trial court concluded:

"3. Mitsuhiro Motoyoshi, Manager, Yutaka Takase, sub-Manager, Keitara Daigo, pro-Manager, Shokochi Uno, pro-Manager, the officers of The

Yokohama Specie Bank, Ltd., San Francisco Branch, as of December 7, 1941, and each of them, had an obligation to plaintiff to attempt to obtain a license authorizing The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, to continue business after December 8, 1941, or a license authorizing payment to plaintiff of its deposits after said date, pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; *and the failure of said officers, and each of them, to discharge said obligation showed an absence of 'good faith' of Section 5(b) (2) of the Trading with the Enemy Act, as amended by the First War Powers Act,* December 18 1941, c. 593 Title III, Sec. 301(2), 50 U. S. C. A., App., Sec. 616 (2)." [Conclusion of Law No. 3, Rec. pp. 66, 103, 141.]

The foregoing finding of fact and conclusion of law were based upon the decision rendered by the United States Court of Appeals for the Ninth Circuit, in *Fujikawa v. Sunrise Soda Water Works,* 158 F. 2d 490, certiorari denied 331 U. S. 832; application for rehearing denied 332 U. S. 785; application to file second petition denied 332 U. S. 853.

In the *Fujikawa* case the court said at page 492:

"There was an obligation of the officers of the bank to the depositors to attempt to obtain from the Secretary of the Treasury a license for a limited operation of the bank which would permit the deposit and withdrawal of moneys, as such action was permitted to the two finance companies and the insurance company which applied for and procured such licenses."

And based upon the foregoing reasoning concluded at page 494:

> "Failure of the bank's officials in the discharge of such an obligation to the depositors shows an absence of 'good faith' of Section 5(b) (2) of the Trading With the Enemy Act, as amended by Sec. 301 of the First War Powers Act, 1941, 55 Stat. 838,"

The Appellate Court in the case at bar, in refusing to disturb the finding of the trial court quoted above, stated:

> "We are asked to hold that this finding and conclusion (that the officers of the bank could have applied for a license or to open the bank and that their failure to do so evidenced the necessary 'good faith') are not supported by the evidence, it being pointed out that in the Fujikawa case above quoted from there was no showing that the officers of the bank were interned. The inferences and conclusions from the evidence are for the trial court to draw and in view of the evidence produced on cross-examination establishing the power of the officers of the bank after internment to make application for a license we cannot hold that the finding and conclusion of the trial court on this subject are not supported by the evidence."
>
> *Paramount Pictures, Inc. v. Clark,* 93 A. C. A. 917, 922.

Summarizing the evidence in the case at bar, and the decision that the Alien Property Custodian had presented insufficient evidence to distinguish the case at bar from the *Fujikawa* case, the Appellate Court said at page 922:

> "Faced with this adjudication (the Fujikawa case) the intervener in the cases before us produced an

immigration officer who testified that the officers of the bank in San Francisco were immediately on December 7, 1941 taken into custody and interned. However on cross-examination this witness stated that these officers would have been permitted to consult with an attorney if they had desired, that they would have been permitted to make application to the Secretary of the Treasury for a license to pay the creditors of the bank and that they would have been permitted to go out with an armed guard if the authorities 'felt there was a good reason.' The trial court found that there was nothing to prevent these officers from applying for a special license to pay the creditors of the bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of 'good faith' of section 5(b) (2) of the Trading With the Enemy Act."

The Appellate Court accordingly affirmed the decision of the trial court that the officers of the Bank lacked the good faith required by Section 5(b) (2) of the Trading With the Enemy Act.

Petitioners by their separate petitions for certiorari seek a review of this determination. No substantial question of law is involved. This court three times refused to review the determination in *Fujikawa v. Sunrise Soda Water Works,* 158 F. 2d 490, which furnishes a determining precedent.

Questions of fact are ordinarily not reviewed by this court especially where there is substantial evidence in the record to support the decision of the state court.

*Southern Power Co. v. North Carolina Public Service Co.,* 263 U. S. 508;

*United States v. Johnson,* 268 U. S. 220.

*Cf.:*

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178.

The petitions for certiorari of McGRATH and of the Superintendent of Banks should be denied.

Respectfully submitted,

WALTER S. HILBORN,

*Attorney for Respondents, Bank of America National Trust and Savings Association, Loew's Incorporated and Universal Pictures Company, Inc.*

LOEB AND LOEB,

*Of Counsel.*